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18 TOMORROW ENERGY CORP. fka SPERIAN ENERGY CORP.

19 UNITED STATES DISTRICT COURT

20 DISTRICT OF NEVADA

21 ANDREW PERRONG, individually and on behalf of  
22 all others similarly situated,

23 Plaintiff,

24 vs.

25 SPERIAN ENERGY CORP., a Nevada corporation,  
26 and ENERGY GROUP CONSULTANTS, INC., a  
27 Kansas Corporation,

28 Defendants.

Related Cross-Claims and Third-Party Claims

Case No. 2:19-cv-00115-RFB-GWF

**TOMORROW ENERGY CORP FKA  
SPERIAN ENERGY CORP'S REPLY IN  
SUPPORT OF MOTION TO STRIKE  
AFFIRMATIVES DEFENSES OF  
ENERGY GROUP CONSULTANTS,  
INC. AND ENERGY GROUP  
CONSULTANTS, LLC**

1 **I. INTRODUCTION**

2 The opposition of Cross-Defendant Energy Group Consultants, Inc. and Third-Party  
3 Defendant Energy Group Consultants, LLC (collectively, the “EGC Parties”) to the motion by  
4 Cross-Complainant and Third-Party Plaintiff Tomorrow Energy Corp fka Sperian Energy Corp.  
5 (“Sperian”) to strike affirmative defenses relies upon an overbroad interpretation of the “fair notice”  
6 standard for evaluating affirmative defenses to permit the inclusion of defenses that have nothing to  
7 do with the claims at issue. The “fair notice” standard does not permit such “redundant, immaterial,  
8 [and] impertinent” matter and, thus, the EGC Parties’ Fifth, Seventh, Eighth, Ninth, Tenth, Twelfth,  
9 Fourteenth, Sixteenth, and Seventeenth Affirmative Defenses<sup>1</sup> fail and should be stricken.

10 **II. ARGUMENT**

11 Sperian’s claims against the EGC Parties relate entirely to a contractual dispute over the EGC  
12 Parties’ obligations to defend and indemnify Sperian for conduct alleged by Plaintiff Andrew  
13 Perrong (“Plaintiff”) in this case. (*See generally* Dkt. No. 26.) With that narrow context in mind,  
14 most of the EGC Parties’ Affirmative Defenses are irrelevant, inapplicable, and at times repetitive,<sup>2</sup>  
15 and thus should be stricken. The EGC Parties’ argument that Sperian will not be prejudiced by these  
16 frivolous affirmative defenses is false—should they not be removed, Sperian will be required to  
17 waste financial resources conducting discovery relating to these defenses, and the Court will  
18 eventually be required to waste time in having to dispose of them.

19 **A. Fifth Affirmative Defense**

20 The Court should strike the EGC Parties’ Fifth Affirmative Defense that “Sperian is barred  
21 from any recovery in this action by the equitable doctrines of laches and failure to do equity with  
22 respect to the matters alleged in the Complaint.” The EGC Parties’ only support for this assertion is  
23 their claim that they are not required to plead all elements of their defense, but that is not what  
24 Sperian is challenging. The EGC Parties provide no support at all for the defense. As Sperian noted  
25

26 <sup>1</sup> Sperian hereby withdraws its Motion to Strike as to the EGC Parties’ Sixth, Eleventh, Thirteenth,  
27 and Fifteenth Affirmative Defenses.

28 <sup>2</sup> As the EGC Parties concede, their Sixteenth Affirmative Defense is redundant and may be stricken.  
(Dkt. No. 50, at p. 7 n.1.)

1 in its motion, Sperian notified the EGC Parties of the EGC Parties' defense and indemnity  
2 obligations within three weeks of the lawsuit being filed, and formally brought claims against the  
3 EGC Parties less than two months later. (*See* Dkt. No. 26.) A laches defense—i.e., that Sperian  
4 unreasonably delayed bringing claims against the EGC Parties—is simply not plausible, and can be  
5 determined just by looking at the docket in this matter.

6 **B. Seventh Affirmative Defense**

7 The Court should strike the EGC Parties' Seventh Affirmative Defense that "Sperian's  
8 claims are barred because EGC's conduct is not unlawful in that EGC complies with applicable  
9 statutes and regulations." The EGC Parties' alleged compliance with applicable statutes and  
10 regulations is irrelevant to Sperian's contractual indemnity claims, and thus this defense cannot stand  
11 as a matter of law.

12 **C. Eighth Affirmative Defense**

13 The Court should strike the EGC Parties' Eighth Affirmative Defense that "Sperian's claims  
14 against EGC are barred because any harm allegedly suffered by Sperian was caused and/or  
15 contributed to by third parties over whom EGC has no control with respect to the time, means,  
16 method, or manner by which they conduct business or personal affairs." The contract between  
17 Sperian and the EGC Parties, which is quoted in the Motion, states the opposite: the EGC Parties are  
18 responsible for the acts of third parties. (*See* Dkt. No. 26, ¶ 21.) The EGC Parties may pursue a  
19 vicarious liability defense as to Plaintiff's claims, as is their right, but such a defense is irrelevant to  
20 Sperian's contractual indemnity claims as a matter of law.

21 **D. Ninth Affirmative Defense**

22 The Court should strike the EGC Parties' Ninth Affirmative Defense that "Sperian seeks  
23 consequential damages which do not flow reasonably or foreseeably from the alleged breaches and  
24 are accordingly not recoverable." As Sperian's Prayer for Relief makes clear, Sperian does not  
25 request unreasonable or unforeseeable consequential damages, but merely what Sperian is entitled to  
26 pursuant to the contract between Sperian and the EGC Parties. (*See* Dkt No. 26, Prayer for Relief at  
27 ¶¶ 1-3.) The EGC Parties claim in their Opposition that Sperian seeks damages "outside the  
28

1 indemnification provision's scope," but Sperian's claims are limited to the contractual language, and  
 2 thus by definition cannot fall outside of the scope of the contract's provisions. (*See id.*)

### 3 **E. Tenth Affirmative Defense**

4 The Court should strike the EGC Parties' Tenth Affirmative Defense that "Sperian's claims  
 5 are barred because EGC did not engage in willful and/or knowing misconduct." None of Sperian's  
 6 contractual indemnity claims depend on knowing or willful conduct, and thus this affirmative  
 7 defense is frivolous and should be stricken.

### 8 **F. Twelfth Affirmative Defense**

9 The Court should strike the EGC Parties' Twelfth Affirmative Defense that "[a]t all times  
 10 relevant to Sperian's allegations, EGC's actions were taken in good faith, for legitimate purposes,  
 11 and for just cause, and at no time did EGC act wrongfully or with malice or reckless indifference  
 12 toward Sperian's purported rights." Whether the EGC Parties breached their contract with Sperian is  
 13 independent of the EGC Parties' claimed good faith, and thus this affirmative defense should be  
 14 stricken.

### 15 **G. Fourteenth Affirmative Defense**

16 The Court should strike the EGC Parties' Fourteenth Affirmative Defense that "Sperian is  
 17 barred from recovery in this action because it fraudulently induced EGC into accepting the contract  
 18 by withholding materials [sic] facts known to Sperian." Affirmative defenses are not excluded from  
 19 Federal Rule of Civil Procedure 9(b)'s requirement that when "alleging fraud or mistake, a party  
 20 must state with particularity the circumstances constituting fraud or mistake." *See also Server Tech.,*  
 21 *Inc. v. Am. Power Conversion Corp.*, No. 06-00698, 2011 WL 1743872, at \*1 (D. Nev. May 6,  
 22 2011) ("Because the affirmative defense . . . sounds in fraud, the affirmative defense must be pled  
 23 with particularity under Rule 9(b) . . ."). Because the EGC Parties do not provide any particular  
 24 details—let alone the who, what, when, where, why, and how— the EGC Parties' Fourteenth  
 25 Affirmative Defense fails.

### 26 **H. Seventeenth Affirmative Defense**

27 The Court should strike the EGC Parties' Seventeenth Affirmative Defense that "Sperian has  
 28 failed to allege a legally sufficient basis, in fact or in law, upon which to predicate an award of

punitive or exemplary damages or attorneys' fees and costs and such damages are, accordingly, not recoverable." Sperian does not seek punitive or exemplary damages, and the contract between the parties explicitly contemplates recovery of attorneys' fees and costs. (Dkt. No. 26, ¶ 21; Prayer for Relief at ¶¶ 1-3.) As such, the EGC Parties' Seventeenth Affirmative Defense fails.

### III. CONCLUSION

For the foregoing reasons, Sperian respectfully requests that the Court strike the EGC Parties' Fifth, Seventh, Eighth, Ninth, Tenth, Twelfth, Fourteenth, Sixteenth, and Seventeenth Affirmative Defenses Affirmative Defenses.

Dated: August 13, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2019, I served a true and correct copy of this document upon all counsel of record by using the United States District Court, District of Nevada's Case Management/Electronic Case Filing System that will electronically mail notification to the following counsel of record:

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